

**CITATION:** M.P. Lundy Construction Inc. v. Wildpine Residence Inc., 2025 ONSC 1614  
**COURT FILE NO.:** CV-19-82333  
**DATE:** 2025 03 12

**SUPERIOR COURT OF JUSTICE – ONTARIO**  
**Proceeding under the Construction Act, R.S.O. 1990, c. C.30 as amended**

**RE:** M.P. LUNDY CONSTRUCTION INC., Plaintiff

**AND:**

WILDPINE RESIDENCE INC., ROYAL BANK OF CANADA and CANAM  
BUILDINGS AND STRUCTURES INC., Defendants

**BEFORE:** C. MacLeod RSJ

**COUNSEL:** Nadia Authier, for the Plaintiff (Moving Party)

Martin Z. Black, for the Defendant Wildpine (Responding Party)

Simon Gollish, for Canam Buildings and Structures Inc.

**HEARD:** March 6, 2025

**DECISION AND REASONS**

[1] This is a motion to remove the lawyer of record for the defendant Wildpine Residence Inc. (WRI) and to prohibit Gibson LLP from acting in that capacity hereafter. At the conclusion of the hearing I granted the order. I gave reasons orally but indicated I would provide an edited version in writing.

**Background**

[2] This is a lien proceeding commenced in December of 2019 for the balance of \$2.6 million said to be owing by the defendant WRI (the owner) to the plaintiff (general contractor or GC) under a “CCDC2 Stipulated Price Contract”. This was in relation to construction of a retirement residence.

[3] The other defendants hold mortgages or other security over the subject lands. The action was discontinued against those defendants when the defendant posted security under s. 41 (1) of the Act and the lien was vacated from title. The lien is now secured by a bond.

[4] The defendant has counterclaimed against the plaintiff for \$12.2 million for breach of contract, misrepresentation, negligence and bad faith.<sup>1</sup>

[5] The action was set down for trial in December of 2021. It is currently scheduled for several weeks of trial in March of 2026.

[6] D. Kenneth Gibson is a lawyer and principal of Gibson LLP (Gibsons), the law firm that bears his name. At all material times, Mr. Gibson was also a director, officer and indirectly a shareholder of the defendant WRI. He was personally involved in the construction project, was examined for discovery on behalf of WRI and will be a material witness at trial.

[7] Mr. Gibson or other lawyers at Gibsons have been the lawyer of record for WRI throughout this proceeding. Although Mr. Gibson's name appears on the pleadings, Jason Rabin, a lawyer and litigator at Gibsons had carriage of the file, conducted discoveries and appeared on the matter until his departure from the firm in May of 2024.

[8] Gibsons at one time had up to 10 lawyers but it currently consists of Mr. Gibson, Lewis McCowell who is a non equity partner and a very junior associate lawyer recently called to the bar.

[9] In 2024 the plaintiff objected to Mr. Gibson continuing as counsel of record and indicated its intention to bring this motion. There ensued some confusion as notices of change were then served naming Mr. McCowell as lawyer of record and then Mr. Black as lawyer of record. It is now clear, however, that Mr. McCowell was lawyer of record in name only and Mr. Black was retained only for this motion.

### **The issue**

[10] The issues are as follows:

- a. Should leave be granted to bring this motion? Leave is required for interlocutory steps pursuant to s. 13 of the procedural regulation.<sup>2</sup> Leave may also be required under Rule 48.04 as the action has been set down for trial.<sup>3</sup>
- b. In light of the certainty that Mr. Gibson will be a witness at trial, do the interests of justice require that neither he nor his law firm may continue as the lawyer of record or represent WRI at trial?

### **Analysis and Decision**

[11] To be clear, what is in issue here is not a conflict of interest between the lawyer and his client. There is no suggestion that anyone at Gibsons has ever acted for the plaintiff.

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<sup>1</sup> Both parties amended their pleadings at various points in time.

<sup>2</sup> O. Reg. 302/18: *PROCEDURES FOR ACTIONS UNDER PART VIII*

<sup>3</sup> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 as amended.

[12] The sole question is whether there is a conflict between the lawyer's role as a material witness and the duty of the lawyer or a member of the firm to the court and to the administration of justice. An advocate must have a level of independence from a client and a witness to discharge his or her professional responsibilities and his or her ethical obligations as an officer of justice. This is the conflict discussed in *Urquhart v. Allen Estate*<sup>4</sup> and *Mazinani v. Bindoo*.<sup>5</sup>

[13] This is an important issue dealing with the integrity of the trial process. As such, I would grant leave to bring the motion. I am not persuaded on the evidence that the plaintiff has delayed bringing the motion for tactical reasons, that there is insufficient time for new counsel to be retained or the timing of the motion is fundamentally unfair. In addition, this issue will be raised at trial if it is not dealt with now and that does risk inefficiency, adjournment and delay if the trial judge finds it inappropriate.

[14] In Ontario it is not an invariable rule that a partner or associate of a lawyer witness must be removed although it is contrary to the CBA model code of conduct and the codes of conduct in certain provinces. Given the size of some law firms on the one hand and the practical exigencies that may exist for small forms or sole practitioners on the other, the courts of Ontario (and the Law Society of Ontario) have deemed that a complete bar is not appropriate.<sup>6</sup>

[15] This does not mean that the courts do not take this issue seriously. There is a conflict of interest when a lawyer is a witness and his partner, associate or employee proposes to act as counsel at trial. Where the evidence will be necessary, where it concerns matters of controversy and where either the reality or the optics are such that counsel cannot be viewed as independent of the witness, an order removing counsel will usually be appropriate.

[16] In granting the motion, I consider the following facts to be decisive:

- a. Mr. Gibson will be a key material witness and his credibility on the matters in issue will have to be assessed by the trial judge.
- b. Mr. Gibson is the principal lawyer at Gibson LLP.
- c. As is evident from the cross examination, Mr. McCowell was not making professional judgments independently of Mr. Gibson who still considered himself to be in charge of the file. Mr. McCowell did not even respond to communication from opposing counsel without asking Mr. Gibson if he had to do so. He was lawyer of record in name only.
- d. There is no other lawyer at Gibsons who could be independent of Mr. Gibson in the exercise of professional responsibilities.

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<sup>4</sup> 1999 CarswellOnt 4126, [1999] O.J. No. 4816, 93 A.C.W.S. (3d) 753 (SCJ) @ paras 11 - 20

<sup>5</sup> 2013 ONSC 4744 @ paras 60 - 61

<sup>6</sup> See *Essa (Township) v. Guergis*, 1993 CarswellOnt 473, [1993] O.J. No. 2581, 15 O.R. (3d) 573, 22 C.P.C. (3d) 63 (Div. Ct.)

- e. It does not appear that the concerns raised by plaintiff's counsel are merely tactical or brought in bad faith.
- f. It would be more damaging to leave this issue to be determined at trial by the trial judge than to make the order now.
- g. There is adequate time between now and the trial for WRI to retain and instruct alternative counsel.
- h. Despite the very clear preference of WRI expressed by a recent resolution of its board, the integrity of the trial process justifies the order that is requested. The involvement of Mr. Gibson as an important trial witness is not merely hypothetical but is a virtual certainty.

[17] In conclusion, the motion is granted. There will be an order removing D. Kenneth Gibson and Gibson LLP as lawyer of record and trial counsel. WRI is to appoint alternative counsel within 60 days.

[18] I will accept costs submissions in writing within the next 30 days.

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Justice C. MacLeod

**Date:** March 12, 2025